Supreme Court, U.S.
FILED

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No. ——

In The Supreme Court of the United States

October Term, 1993

Thomas Herrmann,
Petitioner,

v.

IUE AFL-CIO Pension Fund and Lloyd J. Hayes, Peter S. DiCicco, Sal T. Ingrassia, John S. Vozella, Clarence Ranallo, and Thomas F. Lynch as Trustees of the IUE AFL-CIO Pension Fund,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Does Title IV of ERISA create a private right of action against persons not parties to a multi-employer plan or otherwise obligated by a duty under ERISA simply upon the allegation that those persons participated in a scheme the purpose of which was to evade or avoid withdrawal liability imposed under 29 U.S.C. § 1381?

B. Does Title IV of ERISA extend federal subject matter jurisdiction to include claims by a plan participant against transferees of an employer's assets which the participant alleges were transferred from the employer in an attempt to evade or avoid the employer's withdrawal liability?

PARTIES TO THE ACTION

Plaintiffs:

IUE AFL-CIO PENSION FUND

LLOYD J. HAYES as Truste of the IUE AFL-CIO Pension Fund

PETER S. DICICCO as Trustee of the IUE AFL-CIO Pension Fund

SAL T. INGRASSIA as Trustee of the IUE AFL-CIO Pension Fund

JOHN S. VOZELLA as Trustee of the IUE AFL-CIO Pension Fund

CLARENCE RANALLO as Trustee of the IUE AFL-CIO Pension Fund

THOMAS F. LYNCH as Trustee of the IUE AFL-CIO Pension Fund

Defendants:

THOMAS HERRMANN

LOCKE MOWERS INC.

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v.

IUE AFL-CIO PENSION FUND AND LLOYD J. HAYES, PETER S. DICICCO, SAL T. INGRASSIA, JOHN S. VOZELLA, CLARENCE RANALLO, AND THOMAS F. LYNCH as Trustees of the IUE AFL-CIO Pension Fund,

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled matter on November 19, 1993, and the order of that court entered on March 23, 1994, denying a petition for rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals in this matter is reported at 9 F.3d 1049 and is reprinted in the Appendix to this petition (1a).[1] (The order denying rehearing

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[1] References in this petition appear as follows: To the numbered pages of the Appendix to this petition: (——a); to the numbered pages of the Joint Appendix filed in the Court of Appeals: (—— JA).

and the Court of Appeals' mandate are not reported but are printed in the Appendix at 26a and 28a respectively).

The memorandum of decision of the United States District Court for the District of Connecticut written by Magistrate Judge Latimer and affirmed and adopted by United States District Judge Daly was not reported but is reprinted in the Appendix at 20a.

JURISDICTION

The Court of Appeals for the Second Circuit entered judgment in this matter on November 19, 1993. Petitioner filed a petition for rehearing with a suggestion for rehearing *en banc* which the Court of Appeals denied by order dated March 23, 1994. Petitioner invokes the jurisdiction of this Court to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(a).

STATUTES INVOLVED

Title 29, United States Code, Section 1451

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the

employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

Title 29, United States Code, Seciton 1392

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

STATEMENT OF THE CASE

Plaintiffs are comprised of a pension fund (the "Fund") and six trustees who administer it. (73 JA). The first defendant, Locke Manufacturing, Inc. ("Manufacturing") was a company located in Connecticut and

was a party to the union agreement involving the pension fund and the employer of the covered union employees. (73-74 JA). Manufacturing was obligated, pursuant to a collective bargaining agreement with a local union affiliated with the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, to contribute to the Fund on behalf of its employees. (74 JA). The second defendant, Thomas Herrmann, was a shareholder and officer of Manufacturing. (74 JA).

In April 1990, the third defendant, Locke Mowers, Inc. ("Mowers"), a Georgia corporation, entered into an agreement (the "Acquisition Agreement") with Manufacturing and Defendant Herrmann. (78 JA). Defendant Herrmann agreed to provide consulting services and entered in an agreement not to compete with Mowers, as well as a one-year employment agreement. (79-80 JA). Herrmann was to receive pay from Mowers as well as a signing bonus. (78-79 JA).

By selling its assets to Mowers, Manufacturing effectively ceased its operations, thereby bringing an end to its obligation to contribute to the Fund. (3-4 JA). Under ERISA, Manufacturing's withdrawal from the Fund triggered its obligation to pay the Fund "withdrawal liability." (4 JA). Plaintiffs sent a notice demanding that Manufacturing pay the withdrawal liability, but no payment was made. (75-76 JA). When payment was not made, suit was commenced against the three defendants. The initial complaint was dismissed and the First Amended Complaint was the subject of a motion to dismiss when it was voluntarily amended.

The Second Amended Complaint alleges seven claims for relief, five of which are directed against Defendant Herrmann.[2] Each of the claims against Defendant Herr-

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[2] Plaintiffs' First Claim is asserted against Manufacturing. They allege Manufacturing was a party to the collective bargaining

mann involve factual allegations that, knowing the withdrawal liability of Manufacturing would be triggered by its sale of assets, Herrmann paid himself excessive salary or bonuses, that he entered into an employment agreement and covenant not to compete with Mowers (79-80 JA), and that he structured the sale of Manufacturing's assets to deplete the assets of the company. (80 JA). The complaint then asserts a wide variety of claims against Defendant Herrmann for this conduct.

In the Second Claim, Plaintiffs allege that these actions of Defendant Herrmann constitute an illegal distribution or dividend under Delaware corporate law and fraud upon the creditors of Manufacturing under Delaware law. (80-81 JA).

The Third Claim alleges that certain monies were received by Defendant Herrmann without any "substantial consideration" and "constitute a fraudulent conveyance under Connecticut law." (81 JA).

Plaintiffs' Fourth Claim asserts Defendant Herrmann is an employer under the provisions of ERISA, 29 U.S.C. § 1002(5), and liable for statutory withdrawal liability because Defendant Herrmann was the sole shareholder of Manufacturing. (81-82 JA).

The Fifth Claim alleges that the manner in which Defendant Herrmann and Mowers structured the sale of Manufacturing's assets deprived Manufacturing of assets from which Plaintiffs could seek payment of withdrawal liability. (82 JA).

Plaintiffs' Sixth Claim asserts that Defendant Herrmann and Mowers "defrauded" Plaintiffs by sending a notice of sale known to be false. (84 JA).

In their Second Amended Complaint, Plaintiffs allege subject matter jurisdiction over the claims against De-

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agreement and is liable under 29 U.S.C. § 1383(a)(1) for statutory withdrawal liability. (74-75 JA). Plaintiffs subsequently voluntarily withdrew all claims against Manufacturing.

fendant Herrmann solely on the basis of ERISA jurisdictional fonts (29 U.S.C. § 1132 and § 1451), diversity of citizenship and pendent jurisdiction. (72 JA). In their brief before the Court of Appeals, Plaintiffs conceded that no basis existed for a claim to jurisdiction on diversity grounds.

On January 17, 1991, Defendant Herrmann filed a motion to dismiss the claims of the Second Amended Complaint directed against him. Defendant Herrmann claimed the Connecticut District Court lacked subject matter jurisdiction and that each of the claims alleged failed to state a cause of action. The motion was transferred to Magistrate Judge Latimer.

Magistrate Judge Latimer, after hearing argument on the motions, issued his recommended ruling on pending motions on December 7, 1992. (199 JA). *Inter alia*, he ruled that subject matter jurisdiction over the claims against Defendant Herrmann did not exist as he was not an "employer" for purposes of the Multiemployer Pension Plan Amendment Act ("MPPAA"). (202-203 JA). Due to the dismissal of the federal claims and the lack of another jurisdictional basis, the pendent claims were dismissed. (203 JA). United States District Judge Daly affirmed and adopted the ruling of Magistrate Judge Latimer on March 29, 1993. (206 JA).

An appeal was taken by Plaintiffs from the decision of the District Court to the Second Circuit Court of Appeals. On November 19, 1993, the Second Circuit Court of Appeals entered its decision affirming in part and overruling in part the decision of the District Court. Though numerous issues were addressed by the Circuit Court, the issue here questioned is the determination of the Circuit Court that jurisdiction over the claims asserted by the Fund existed because the appellants had stated a colorable federal claim. The Circuit Court found a "colorable federal claim" to have been stated under the "liberally-construed Fifth claim of the Complaint." (11a).

It is this portion of the Second Circuit's decision that gives rise to this appeal. Petitioner challenges the finding of federal jurisdiction under ERISA on the basis of allegations that he participated in a scheme to deplete the assets of a corporation which was an employer subject to withdrawal liability.

REASONS FOR GRANTING THE WRIT

The fundamental flaw in the decision below is that clear language limiting the jurisdiction of the federal district court has been radically redefined by what, in effect, is the creation of a new right of action under ERISA. That new right of action is deemed necessary to accomplish a purpose, which purpose is found only by strained implication in the language of 29 U.S.C. § 1392(c).

The reasons this result is improper are several: First, the decision creates a right of action under ERISA against a limitless and undefined class of persons. Second, it implies a federal right of action based upon an interpretation of § 1392(c) which is faulty. Third, the newly created right of action is totally unnecessary and duplicative of existing remedies and will require the judicial creation of elusive standards inconsistent with traditional rules on what transfers of an obligor may be avoided by creditors.

I. THE CIRCUIT COURT'S DECISION IMPROPERLY IMPLIES A RIGHT OF ACTION AGAINST PARTIES NOT SUBJECT TO ANY ERISA OBLIGATION.

The claim of the Plaintiffs is for collection of the withdrawal liability. Defendant Herrmann is alleged to have been an officer/shareholder of a corporation (Locke Manufacturing) which was the employer and participant in a multiemployer pension plan. Defendant Herrmann is not alleged to have been the employer. Defendant Herrmann argued that, as an individual officer/shareholder, he had no responsibility for payment of the withdrawal liability. The decision of the district court agreed that Herrmann

was not liable as an employer (22a). This point is well-founded upon decisions from other district and circuit courts and remains undisturbed by the decision of the Circuit Court.

The Second Amended Complaint asserts Defendant Herrmann is liable under the MPPAA as well as under traditional state common law and statutory forms of liability (such as fraudulent conveyances, excess dividends, etc.). Although a series of complaints had originally alleged jurisdiction upon a number of grounds including diversity, by the time of the appeal to the Second Circuit, it was clear that the only basis upon which any subject matter jurisdiction could exist as to the claims against Defendant Herrmann and Co-Defendant Locke Mowers, Inc. was on the basis of 29 U.S.C. § 1451(a)(1). The decision of the Circuit's panel, which focuses only on that jurisdictional statute, reflects an awareness that this statute was the linchpin of Plaintiffs' argument for subject matter jurisdiction in federal court. The Circuit Court did not address or modify the decision of the district court that Defendant Herrmann was not liable as an employer under ERISA. Rather, the Circuit Court went on to explore whether any federal claim could be found against Defendant Herrmann under the MPPAA.

The decision of the Circuit Court examined first the language found in 29 U.S.C. § 1451(a)(1) (1988):

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely effected by *the act or omission of any party under this subtitle with respect to a multi-employer plan,* or any employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(11a) (emphasis supplied in original). The Circuit Court's emphasis of this key phrase should have focused attention on the issue at hand: whether or not Defendant

Herrmann would be a "party under this subtitle." It has never been claimed that Defendant Herrmann was a plan participant, beneficiary or fiduciary of any kind. The only allegation of any duty on his part under the subtitle was the rejected contention that he was liable as an employer. Once that contention was rejected, it was clear Defendant Herrmann had no duty, obligation or liability under ERISA. The decision of the Court of Appeals disregards this key fact, ignores the meaning of the phrase "under this subtitle", and opens up jurisdiction under ERISA to claims against any party.

The decision of the Panel proceeds on the basis that allegations that "Herrmann participated in a scheme, the principal purpose of which was to evade or avoid withdrawal liability by depriving [the corporate employer] of funds sufficient to meet its pension liability," could somehow make Defendant Herrmann a party liable under this subtitle. This reasoning was justified by reference to 29 U.S.C. § 1392(c). The language of that section is as follows:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Focusing principally upon the phrase "and collected" within the parenthetical, the Circuit Court determined that if the liability is to be collected, then transferors who receive assets in a transaction to evade or avoid liability must be before the court. From that assumption, the Circuit Court then redefined "parties under this subtitle" to include any person who was alleged to have received a improper transfer of assets in such a transaction.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set forth the criteria to be used to determine if an implied right of action exists:

(1) Whether the plaintiff is one of the class for whose special benefit the statute was enacted—that is, whether the statute creates a federal right in favor of the plaintiff;

(2) Whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;

(3) Whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff; and

(4) Whether the cause of action is one that is traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. 422 U.S. at 78. Of the four criteria, greater focus is usually placed on the second criteria—Congressional intent. *Karahalios v. National Federation of Federal Employers, Local 1263*, 489 U.S. 527, 532-33 (1989).

In *Mertens v. Hewitt Associates*, —— U.S. ——, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), this Court held that nonfiduciaries, even those alleged to have knowingly participated in a breach of a fiduciary duty imposed by ERISA, are not liable under ERISA. In doing so, the limitations of actions under ERISA were analyzed by this Court. In that analysis, this Court expressed an unwillingness to infer causes of action under ERISA which appears to have been disregarded by the Second Circuit Court of Appeals.

> In *Russell* [*Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)], we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S., at 146-147, 87 L.Ed.2d 96, 105 S.Ct. 3085.

Mertens, 124 L.Ed.2d at 169.

The legislative history of 29 U.S.C. § 1392 indicates that the Congressional intent was to make *employers*

liable for withdrawal liability. *See*, House Report (Ways and Means Committee) No. 96-889(II), 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2992, 3005 ("Under the bill, an *employer* who withdraws from a multiemployer plan generally is liable to the plan for the portion of the plan's unfunded benefit obligations (if any) assigned to the employer.") (emphasis added); House Report (Education and Labor Committee) No. 96-889(I), 96th Cong., 2d Sess. 52, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2920 ("[T]he legislation: . . . (3) requires *employers* who withdraw from a multiemployer plan, or who experience severe declines in their covered operations under the plan, to continue to fund their fair share of the plan's unfunded benefit obligations.") (Emphasis added). Defendant Herrmann is not an employer, *see, Sasso v. Cervoni*, 985 F.2d 49 (2d Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 2964, 125 L.Ed.2d 664 (1993), and the legislative history does not indicate an intent to go beyond employers in collecting withdrawal liability.

II. THE DECISION BELOW IMPLIES A FEDERAL RIGHT OF ACTION BASED UPON A FAULTY INTERPRETATION OF SECTION 1392.

The only basis in the decision of the Second Circuit Court of Appeals for implying a new federal right of action to pursue transferees of assets is based upon the inclusion of the language "and collected" in the parenthetical of § 1392(c). The reasoning of the Panel was that unless parties to whom allegedly improper transactions were made are brought before the court, such withdrawal liability cannot be collected. This reasoning was error. The "and collected" language was intended only to accomplish the apparently unique scheme in the MPPAA wherein liability once assessed against the corporate employer must be paid in regular payments even though the amount or existence of that liability might be contested by the employer. *See* 29 U.S.C. § 1401(d). Section 1392(c) intends only to state that the existence of a

transaction to evade or avoid does not prevent the imposition or the collection of withdrawal liability from the employer. It does not enlarge the definition of responsible parties.

There are three subsections contained in § 1392. The statute in its entirety reads as follows:

> (a) Defintion
>
> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising . . .
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.
>
> (b) Payments of withdrawal liability not considered contributions
>
> Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.
>
> (c) Transactions to evade or avoid liability
>
> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

To understand the meaning of this Section, the Court must recall the manner in which withdrawal liability is triggered. Under 29 U.S.C. § 1381, withdrawal liability arises when an "employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal." A complete withdrawal under § 1383(a) "occurs when an employer: (1) permanently ceases to have an *obligation to contribute* under the Plan. . . ." (emphasis

added). A partial withdrawal under § 1385(a) occurs when, among other things, "(2) there is a partial cessation of the employer's *contribution obligation*." (emphasis added). In short, it is the cessation of the obligation to contribute which determines when withdrawal occurs. Congress clearly anticipated in drafting the MPPAA that employers, particularly corporate employers, might structure transactions so that the obligation to contribute could be found to continue and, thus, defer or postpone into the indefinite future the accrual of withdrawal liability. Section 1392 was designed to prevent employers from circumventing the accrual of the withdrawal liability by improperly contending they were still obligated to contribute to a multiemployer pension plan.

Section 1392(a) first limits what kind of event can create an obligation to contribute and then specifically excludes the obligation to pay withdrawal liability from the definition of the term "obligation to contribute." The effect of that section is to prevent some other form of liability to contribute from being asserted as a basis to prevent the accrual of withdrawal liability.

Section 1392(b) states that "payment of withdrawal liability under this part shall not be considered contributions for the purposes of this part." That is, the fact that payments of withdrawal liability are being made or are due cannot be asserted as obligations to contribute which can defer the withdrawal liability.

Section 1392(c) arose from the same focused intent. The subsection functions as a catch-all provision designed to deal with the myriad schemes (not yet anticipated by Congress) by which an *employer* could claim the obligation to contribute still continued and thus postpone the accrual of withdrawal liability. No scheme or device of an employer to prolong an obligation to contribute can be created as a basis to avoid or evade liability.

With the intent of Congress in enacting § 1392 in mind, the use made of it by the Circuit Court is demonstrably

incorrect. The facts in this case do not allege that any of the transactions or transfers alleged by Plaintiffs had the purpose "to evade or avoid liability under this part." No one has argued that Locke Manufacturing's liability as the employer was in any way effected by any of the transactions in question. Indeed, every complaint filed has affirmatively alleged the corporate employer has always been liable for withdrawal liability. The allegations are that Mr. Herrman's actions affected the ability of the corporate employer to satisfy such liability. Did Congress intend § 1392 to create a new federal right of action against limitless classes of defendants for transactions which negatively impact an employer's ability to pay withdrawal liability?

The ability of an employer to satisfy withdrawal liability is simply not the subject matter of any provision in § 1392. No one argues that § 1392(c) shields fraudulent transactions. Clearly, a multitude of remedies exist to set aside fraudulent conveyances and recover assets. The question is whether § 1392(c) creates a new federal right of action if a beneficiary alleges that some distribution was made for the purpose of preventing payment of withdrawal liability.

III. THE DECISION BELOW CREATES A NEW UNNECESSARY FEDERAL RIGHT OF ACTION ENTIRELY DUPLICATIVE AND POTENTIALLY INCONSISTENT WITH EXISTING CREDITORS' REMEDIES.

Not only does the Panel's interpretation of § 1392 run contrary to the clear and definitive language in § 1451, but it is also totally unnecessary. As Plaintiffs' Amended Complaint itself shows, more than adequate remedies at law are available against any party who is alleged to have received an improper transfer. These remedies include fraudulent conveyance statutes, corporate statutes limiting dividends and distributions and the comprehensive and thorough protection of the federal bankruptcy

statutes. The only benefit to this interpretation of § 1392(c) is the tactical benefit of a new threat which can be used in the negotiation for payment of withdrawal liability when that negotiation is being made with the shareholders/officers who will become targets of claims of improper distributions unless they agree to the demands of Plan beneficiaries.

Another difficulty with the Circuit Court's interpretation of § 1392(c) is how the basis of transferee liability will be determined. Under traditional fraudulent conveyance statutes and preference statutes, it is the fair value of the consideration exchanged which determines whether the exchange is valid. Under the statute on which Plaintiffs rely, the appropriateness, reasonableness or fairness of the transaction does not appear to be relevant. Rather, it is the purpose of the transaction. If the decision of the Circuit Court below remains in force, different rules will be applied for different groups of creditors. Creditors who asset a claim for withdrawal liability will proceed under this new (and yet to be written) body of law. All other creditors will not. Can this be what Congress intended by § 1392(c)?

Respectfully submitted,

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